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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAMES LIGHTNER, Defendant and Appellant.	A153588 (Alameda County Super. Ct. No. 17-CR-018501)
In re JAMES LIGHTNER, on Habeas Corpus.	A156236

A jury convicted defendant of three counts of forcible rape (Penal Code section 261) and two counts of forcible oral copulation (Penal Code section 288a).[1] The court sentenced defendant to consecutive prison terms for each conviction. Defendant's convictions arose from his sexual assault of one victim over a number of hours. Defendant argues that the offenses occurred on three, rather than five, "separate occasions" as defined under section 667.6, subdivision (d)'s mandatory consecutive sentencing provision. He also argues that the prosecutor committed prejudicial misconduct by repeatedly engaging in speaking objections that denigrated defense counsel.

[1] All further statutory references are to the Penal Code unless otherwise specified.

While his appeal was pending, defendant filed a petition for writ of habeas corpus, which we consolidated with his appeal. We affirm the judgment and deny the petition for writ of habeas corpus.

FACTS AND PROCEDURAL BACKGROUND

I. The Prosecution's Case

Defendant was charged by information with three counts of forcible rape (§ 261, subd. (a)(2)) and two counts of forcible oral copulation (§ 288a, subd. (e)(2)(A)).[2]

A. Doe's testimony

At trial, the victim, Jane Doe, testified that she and defendant had a friendly relationship for 30 years, which at times included sex. Doe had a son with defendant, although defendant had married another woman.

At approximately 3:00 a.m. on the day of the offenses, Doe received a call from defendant and let him in to her apartment complex. When he arrived at her door, Doe greeted him with a hug. Defendant was sweaty, and his clothes were wet, so Doe took his coat, and defendant took his shirts off so that Doe could hang them in the shower to dry. Doe did not feel like cooking a meal, but she began making popcorn for defendant. As she did, defendant came up from behind and fondled her. Doe told him that she was not in the mood, and she turned off the stove and went to the couch. Defendant sat next to her, and the two drank brandy.

Defendant began spilling drinks and getting angry. Doe told defendant to quiet down, but he yelled and cussed. When Doe told him to leave if he could not be quiet, defendant said he was not going anywhere. He hit Doe on the temple with the palm of his hand. He said that Doe was going to have another one of his babies. He began kissing Doe. Doe was five feet three inches tall and weighed 104 pounds. Doe told defendant to stop. He pinned her down despite her struggle and bit and sucked her neck.

[2] Defendant was also charged with one count of criminal threats (§ 422), but that charge was dismissed under section 995.

When Doe asked defendant why he was doing this to her, he said that he was doing it because he loved her. Doe continued to try to get defendant off of her. Defendant took off Doe's pants and started having vaginal sex with her while telling her to shut up. Doe told him to stop. Defendant lost his erection, Doe was able to put her pants back on, and the two sat on the couch during what Doe called a "cooling off period."

Doe subsequently tried to go to the bathroom, but defendant pulled her back by the arm. Doe told defendant that her sister was coming to pick her up, which she made up so he would leave, and defendant told her to call her sister and tell her that Doe was being kidnapped. He said he loved Doe and tried to kiss her; Doe said no. Defendant then stood up, put his hand behind Doe's head, and put his penis into her mouth; after about thirty seconds, Doe accidentally bit defendant. He slapped Doe and said, "You just bit my shit."

Defendant then pushed Doe back down onto the couch, got on top of her, and raped her. Defendant penetrated Doe for less than a minute, but it hurt, and she told him to stop. Defendant lost his erection and sat down on another couch; he talked loudly and said that he knew Doe would call the police.

Defendant next put his mouth on Doe's vagina, roughly sucking and biting her. She told him, "No," that it did not feel good, and she tried to push him off. This oral copulation lasted about a minute and a half. Doe told defendant she did not want to do this, and she kept asking him why he was doing this; defendant told her to "shut up."

Finally, after undressing her, defendant put his penis inside Doe's vagina for the third time on the couch. Doe testified that defendant had his hand on his penis each time he raped her, the entire assault took about three and a half hours, and he fell asleep after the third rape. Doe was able to redress three times during the sexual offenses.

At some point during the offenses, Doe made it to the bathroom and hid her phone because she knew that if defendant saw it, he would take it. She also texted her friend and neighbor, K. Wheeler. After defendant fell asleep and Doe made it to her phone, she called Wheeler, and went to Wheeler's apartment. When she got there, Doe did not tell

Wheeler everything that had happened; she said she had an argument with defendant and he would not leave her apartment. They made a plan to get him out. When the two returned to Doe's apartment, defendant was asleep, and Doe woke him and said her ride was there.

Defendant got dressed and left. He returned and knocked on the door, but Doe did not answer. Wheeler said that defendant asked for rings he had left in the apartment. When Doe and Wheeler left shortly thereafter in Wheeler's car, Doe took defendant's rings with her. They saw defendant on the street, Wheeler slowed the car down, and Doe held the rings out of the car window to defendant. He asked for a ride to the BART, and Wheeler refused. Defendant replied, "Fuck y'all. I'mma kill both of y'all."

Doe testified that she did not know what to do on the morning of the incident, but the next morning, she decided to call the sheriff. She also went to the hospital where she underwent a sexual assault exam.

B. Wheeler's testimony

Wheeler testified that she and Doe had been friends for many years. On the morning of the incident, Doe called Wheeler and asked if she could come over. When Doe arrived at Wheeler's apartment, Doe had blood shot eyes, and she was bruised and crying. Doe said, "He kept hurting me. He did this to me." Doe also told Wheeler, "He hit me. He took advantage of me," and "He kidnapped me. He wouldn't let me leave."

Doe told Wheeler that Doe had received a call at about 3:00 or 4:00 a.m., and she thought it was her boyfriend, but it was defendant. Doe welcomed defendant into the apartment, but things quickly changed. Defendant wanted sex; Doe refused. Defendant got mad, hit her on the head, and said, "You gone (sic) give me some of that pussy." Wheeler testified that Doe broke down after telling her this. The two stayed in Wheeler's apartment while Doe told Wheeler parts of what happened. Wheeler told Doe that they should get defendant out of Doe's house. Pretending to be Doe's sister, Wheeler went with Doe to Doe's apartment, and Doe told defendant that she had to leave. Doe and Wheeler got in Wheeler's car about ten to fifteen minutes after defendant left because

Wheeler had an appointment, and they encountered defendant on the street; Doe returned defendant's rings from the car window, and he threatened to kill them.

Wheeler testified that she spent the day with Doe. Doe told her that she had shut down defendant's advances because she was dating someone else. When the police interviewed Wheeler, she told police that Doe said that defendant "practically" raped her, and at trial Wheeler testified that Doe told her that defendant raped her. Wheeler recalled that Doe talked to her boyfriend throughout that day, and that Doe was upset that her boyfriend was upset about what had happened.

C. The physician assistant's testimony

The physician assistant who performed Doe's sexual assault examination testified that he found an abrasion on Doe's posterior fourchette, between her vagina and her anus, and that such injury is not very common. Doe told him that she could be in early menopause, and he testified that menopause could cause abrasions. The physician assistant also testified that the abrasion could be caused by a man's hand if the man had his hand on his penis during sex. He conceded that such an injury could be present after consensual and nonconsensual sex and testified that he did not observe trauma to Doe's vagina or a bite injury to her genitals. He did observe two small hemorrhages inside of Doe's left cheek and bruises on the front and back of her right shoulder and her right wrist. He also noted a hickey-type bite mark on her neck.

II. The Defense Case

The defense brought out numerous contradictions between Doe's trial testimony and her statements to police and at the preliminary hearing, including that Doe said at the preliminary hearing that, at one point during the sexual assault, she and defendant moved to the bedroom, and that defendant raped her twice, not three times. Doe conceded that she told police she did not like that defendant had married another woman, and she had wanted to be a family with defendant for the sake of their son. Doe admitted that she had asked defendant to move in with her before; she had an empty drawer for defendant; and she told defendant, "I love you" when they talked on the phone. Doe also admitted that she was an alcoholic and drank about a pint of alcohol every day.

A deputy sheriff testified that Doe had been arrested for making a false emergency call stating that her son committed domestic violence and was armed. An expert on phone data collection and interpretation testified that, between July 1, 2016 and June 6, 2017, defendant and Doe exchanged 980 calls and 446 texts. On the morning of June 6, 2017, there was no record of a text between Doe and Wheeler, but Doe called Wheeler twice. Finally, neighbors who lived next door to and across the hall from Doe testified that they did not hear noise coming from Doe's apartment on the night of the incident.

The jury convicted defendant of three counts of forcible rape and two counts of forcible oral copulation. Defendant moved for a new trial on the ground that the prosecutor committed misconduct. The court denied the motion for lack of misconduct and prejudice, and it sentenced defendant under section 667.6, subdivision (d) to five consecutive prison terms totaling 36 years. Defendant appealed.

While the appeal was pending, defendant filed a habeas petition supported only with his own statements. This court consolidated the petition and defendant's appeal.

DISCUSSION

I. Prosecutorial Misconduct

Defendant argues that the prosecutor engaged in misconduct by making numerous speaking objections that denigrated the credibility of defense counsel and violated the court's in limine order forbidding speaking objections.

In order to preserve the issue of prosecutorial misconduct for appeal, trial counsel must make a specific and timely objection to the misconduct. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*Ibid.*)

Defendant points to over two dozen instances of alleged prosecutorial misconduct, but defendant did not specifically object to the vast majority of this alleged misconduct or otherwise request an admonition. On the three occasions when defense counsel objected

to the prosecutor's statements in the jury's presence, counsel did not ask the court to admonish the jury to disregard the prosecutor's remarks. Nothing in this record suggests that timely specific objections or requests for admonitions would have been futile. To the contrary, the court was receptive to defense counsel's few requests that the prosecution cease making speaking objections, and the court independently instructed the prosecutor more than once to stop making improper objections. Defendant has forfeited his prosecutorial misconduct claim. (*People v. Pearson* (2013) 56 Cal.4th 393, 425, 431 (*Pearson*).)

His claim also lacks merit in any event. For prosecutorial misconduct to constitute a violation of federal law, the misconduct must so infect "the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Conduct constitutes prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' [Citations.]" (*People v. Benavides* (2005) 35 Cal.4th 69, 108.) When a defendant's claim focuses upon comments the prosecutor made before the jury, the issue is whether a reasonable likelihood exists that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1403.) " '[W]e "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' [Citations.]" (*Ibid.*) The defendant must also establish prejudice—that, had the prosecutor refrained from the misconduct, is it reasonably probable that the defendant would have received a more favorable result. (*People v. Haskett* (1982) 30 Cal.3d 841, 866.)

"Objections constitute misconduct only if they go beyond the charge of legal or procedural violation and directly or by clear inference question the motives or integrity of opposing counsel." (*People v. Price* (1991) 1 Cal.4th 324, 448.) In *Price*, the defendant argued that the prosecutor committed misconduct by making over a dozen speaking objections and statements in the presence of prospective jurors that imputed improper motives to defense counsel. Although the prosecutor made many improper speaking

objections, our Supreme Court found that in the course of a four-and-a-half-month jury selection process, these objections did not constitute misconduct. (*Id.* at p. 449.) The Supreme Court also rejected the argument that the speaking objections denigrated defense counsel. Although the prosecutor's remarks were strongly worded, they merely revealed the prosecutor's frustration with defense counsel's apparent inability to understand or to clear up ambiguity in his questions, and they did not impute improper motive to him. (*Id.* at pp. 449–450.) Similarly, the prosecutor's challenges to the propriety of the defense counsel's questions, and not his motive for asking these questions, did not constitute misconduct. (*Id.* at p. 450.)

Having carefully reviewed the objections here, we find that the prosecutor's use of speaking objections, although improper and not to be condoned, did not constitute misconduct. The prosecutor directed her objections to the form of defense counsel's questions, and she did not directly or by clear inference denigrate defense counsel's credibility. The court also chastised the prosecutor in front of the jury on a number of occasions after her objections, suggesting that the prosecutor, not defense counsel, was acting improperly. On this record, we do not infer that the jury would have drawn damaging implications about defense counsel from the prosecutor's objections. (See *People v. Spector*, *supra*, 194 Cal.App.4th at pp. 1402–1403.) Indeed, courts have declined to find misconduct in more egregious situations, such as where the prosecutor called defense counsel's questioning or arguments "disingenuous" (*People v. Pearson*, *supra*, 56 Cal.4th at pp. 431–432), "ludicrous," or "a smoke screen" (*People v. Frye* (1998) 18 Cal.4th 894, 978, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22).

II. Sentencing under section 667.6, subdivision (d)

Defendant next argues that the court erred in imposing five, rather than three, consecutive terms under section 667.6, subdivision (d). Defendant concedes that his first rape of Doe occurred on a "separate occasion" from his other four offenses, but he contends that the court failed to sufficiently articulate a factual basis for finding he committed offenses on four additional separate occasions.

As is relevant here, section 667.6, subdivision (d) mandates fully consecutive sentences for the sex crimes of which defendant was convicted "if the crimes . . . involve the same victim on separate occasions." "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (§ 667.6, subd. (d); see also Cal. Rules of Court, rule 4.426(a)(2).) Where, as here, a trial judge has found under section 667.6, subdivision (d), that a defendant committed offenses on separate occasions, this court will reverse "only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior. Citations.]" (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.)

"Under the broad standard established by . . . section 667.6, subdivision (d), the Courts of Appeal have not required a break of any specific duration or any change in physical location." (*People v. Jones* (2001) 25 Cal.4th 98, 104.) There is no bright line rule in finding a separate occasion. "[A] forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter." (*People v. Irvin* (1996) 43 Cal.App.4th 1063, 1071 (*Irvin*).) "A violent sexual assault cannot and should not be considered in the same light as sexual acts shared between willing participants. Consensual sex may include times when the participants go back and forth between varied sex acts, which they consider to be one sexual encounter. By contrast, a forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter. Such a sexual assault . . . is not motivated by sexual pleasure. Instead, it is frequently intended to degrade the victim . . . . Therefore, at sentencing a trial court could find the defendant

had a 'reasonable opportunity to reflect upon his or her actions' even though the parties never changed physical locations and the parties 'merely' changed positions." (*Ibid*.)

Here, the court found that "pursuant to *People v. Garza*, a 2003 case at 107 Cal.[App.]4th 1081, as well as *People v. Plaza*, a 1995 case at 41 Cal.[App.]4th 377, that the sentencing scheme does in fact fall within the purview of Penal Code section 667.6(d), which would in fact call for mandatory full term consecutive sentencing." In making this finding, the court implicitly found that defendant had a reasonable opportunity to reflect upon his actions and nevertheless resumed his sexually assaultive behavior. (See *People v. Garza*, *supra*, 107 Cal.App.4th at p. 1092 [reversal required only where no reasonable trier of fact could have found that defendant had a reasonable opportunity for reflection after an offense before resuming assaultive behavior]; *People v. Plaza* (1995) 41 Cal.App.4th 377, 384–385 [multiple convictions affirmed where defendant had reasonable opportunity to reflect, notwithstanding that several crimes occurred while defendant kept victim in her bedroom and thereby retained the "*opportunity to attack*"].)

The court's finding is supported by the evidence. Doe testified that defendant raped her and then a "cooling off period" ensued during which she put her pants back on. Defendant intercepted Doe when she tried to move to the bathroom and pulled her back to the couch. He subsequently began stroking his penis, stood at the side of the couch where Doe sat, grabbed the back of her head, and put his penis in her mouth. When Doe accidentally bit defendant after about 30 seconds, he hit her on the side of the face and yelled at her. Defendant then pushed Doe down on the couch and raped her. A reasonable judge could have concluded that between the second and third offenses, a break occurred during which defendant had the time to slap and yell at Doe, thus affording him a reasonable opportunity to reflect on his actions. (See *People v. Garza*, *supra*, 107 Cal.App.4th at p. 1092].)

Next, although Doe did not testify regarding how much time elapsed between the fourth and fifth offenses, she testified that defendant took her clothes off for the last rape. She further testified that she was able to re-dress three times during the forcible sex acts

and that she did so after the first and third offenses. The record supports a reasonable inference that Doe had her clothes on during the second offense because she said that she put her pants back on after the first rape, that defendant spoke for some time thereafter, and the next thing she knew, he touched himself, came over to her, and put his penis in her mouth. A reasonable inference can thus be drawn that Doe redressed for the third time between the fourth and fifth offenses, and the court permissibly concluded that defendant had a reasonable opportunity to reflect on his actions and resumed sexually assaultive behavior when he undressed Doe and raped her for the last time. The imposition of a "full, separate, and consecutive term" on the five crimes was thus warranted by the facts and mandatory. (§ 667.6, subd. (d); Cal. Rules of Court, rule 4.426(a)(2).)

Relying on *Irvin*, defendant argues that even if section 667.6, subdivision (d) applies, remand is required because the court failed to articulate a factual basis for concluding that each crime occurred on a separate occasion. In *Irvin*, the defendant was convicted of 20 sex crimes, including 15 counts of sexual penetration, and the trial court imposed consecutive sentences on all 20 counts. The appellate court remanded for resentencing because it doubted on the record that "any reasonable trier of fact could find that every act or offense was committed on a separate occasion." (*Id.* at p. 1071.) *Irvin* stands for the proposition that a remand for resentencing is justified where the record leaves room for doubt regarding whether a reasonable trier of fact could find every offense was committed on a separate occasion. (*Ibid.*) Unlike in *Irvin*, the record here provides sufficient evidence from which the court could find each offense was committed on a separate occasion, and we do not require more specific findings for a meaningful review. There is no need for a remand.

III. The Habeas Petition

Defendant's habeas petition alleges: 1) the evidence was insufficient to convict him of forcible rape and oral copulation and to sentence him to five consecutive terms under section 667.6, subdivision (d); 2) Doe's testimony was false under section 1473, subdivision (b); and 3) defendant received ineffective assistance from his trial counsel

who failed to provide him with discovery until after trial, deprived him of his right to decide whether to testify in his defense, and made crucial tactical decisions without adequately explaining all options. "Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to plead sufficient grounds for relief, and then later to prove them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474, italics omitted.) "[A]ll presumptions favor the truth, accuracy and fairness of the conviction and sentence." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260.) This petition fails to allege facts that, if true, would entitle defendant to relief.

A. Sufficiency of the Evidence Challenges

Defendant's first and second challenges to the sufficiency of the evidence supporting his convictions and the court's decision to sentence him to five consecutive prison terms are not cognizable in a habeas petition (*In re Lindley* (1947) 29 Cal.2d 709, 723), and we disposed of defendant's second challenge in his appeal. The petition is summarily denied on these grounds.

B. False Evidence

Defendant's claim that he was convicted through Doe's false testimony is cognizable in this habeas proceeding (§ 1473, subd. (b)(1)), but defendant has not established entitlement to relief on this basis. To establish falsity, defendant relies only on his conclusory assertions and Doe's inconsistent statements. " 'Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing.' [Citation.]" (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.) In convicting defendant, the jury necessarily found Doe's testimony was credible, and we defer to this credibility determination here where defendant does not offer new evidence suggesting that Doe's testimony was false. (*In re Roberts* (2003) 29 Cal.4th 726, 744.) With respect to Doe's alleged inconsistent statements, inconsistent evidence is not synonymous with false evidence, even if the inconsistencies diminish a witness's credibility. (*Id.* at p. 743.)

Further, defendant cannot support his false evidence claim with testimony he elected not to give at trial. A defendant has a constitutional right to testify at trial, but that right can be waived. (*People v. Hayes* (1991) 229 Cal.App.3d 1226, 1231.) "When the record fails to disclose a timely and adequate demand to testify, 'a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to counsel his desire to testify, he was deprived of that opportunity.' " (*People v. Alcala* (1992) 4 Cal.4th 742, 805–806, citing *People v. Hayes*, *supra,* 229 Cal.App.3d at pp. 1231–1232.) Defendant was informed of his right to testify on the record; he never changed his statement on the record during trial that he did not intend to testify; and, as we explain next, defendant does not establish that defense counsel rendered ineffective assistance by denying defendant the right to decide whether to testify. Defendant thus cannot submit his post-conviction testimony to show Doe's testimony was false.

C. Ineffective Assistance of Counsel

Under the United States and California Constitutions, a criminal defendant has the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686, 691–692 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) The defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent and conscientious advocate. (*In re Marquez* (1992) 1 Cal.4th 584, 602.) The defendant bears the burden of rebutting the presumption that he received effective assistance. (*People v. Garrison* (1989) 47 Cal.3d 746, 788.)

To do so, first the defendant must show that counsel's performance fell below an objective standard of reasonableness. (*Strickland*, *supra*, 466 U.S. at pp. 687–688.) We accord great deference to trial counsel's tactical decisions so long as they are based upon adequate investigation and preparation. (*In re Marquez, supra*, 1 Cal.4th at p. 603.) Second, defendant must show prejudice from counsel's alleged deficiencies. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." (*Strickland*, at pp. 693.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at pp. 693–694.)

Defendant first claims ineffective assistance of counsel because his trial counsel did not give him discovery until after trial, but defendant does not identify the discovery that he claims he did not receive, and he does not provide any facts to show that, had he been given this discovery, a reasonable probability exists that the results of his trial would have been different. He has failed to show a prima facie case of ineffectiveness of counsel. (*Strickland, supra*, 466 U.S. at p. 697 ["If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed"].)

Defendant also failed to show that he was denied the right to testify at trial. In order to demonstrate denial of the right to testify, a defendant's habeas declaration must assert that he communicated his desire to testify to trial counsel. (See *People v. Hayes, supra*, 229 Cal.App.3d at p. 1235, fn. 12.) Defendant states only, "I was denied effective assistance of counsel and of my right to control over critical decisions like me takeing (sic) the stand in my defense, but my counsel made a lot of critical crucial tactical decisions without adequately explaining all options." Defendant does not indicate that he told his attorney that he wanted to testify, or that his attorney, knowing of his wishes, nevertheless refused to allow him to testify. The record also shows that defendant's counsel respected defendant's control over his decision whether or not to testify, that his counsel had extensive discussions with him about his right to testify, and that defendant acknowledged in open court that he intended to exercise his right to remain silent.

Finally, although defendant claims his trial counsel made "crucial tactical decisions without adequately explaining all options," he does not allege facts showing what these crucial tactical decisions were, how counsel's actions fell below an objective standard of reasonableness or resulting prejudice. Defendant thus does not set forth a prima facie case of ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed, and the petition for writ of habeas corpus is denied.

_____
BROWN, J.

WE CONCUR:

_____
POLLAK, P. J.

_____
STREETER, J.

People v. Lightner, In re Lightner (A153588, A156236)